INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4C

CANADA

This is the **summative (formal) assessment for Module 4C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 4C. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

44/50

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment4C]**. An example would be something along the following lines: 202223-336.assessment4C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which branch of the Canadian government has the exclusive power to make laws in relation to bankruptcy and insolvency? Indicate the **correct answer** from the options below:

(a) Federal.

(b) Provincial.

(c) Municipal.

(d) The power is shared between the three levels of government.

Question 1.2

Which federal statute governs the bankruptcy regime in relation to an individual bankruptcy? Select the **correct answer** from the options below:

(a) The Bankruptcy and Insolvency Act (BIA).

(b) The Companies' Creditors Arrangement Act (CCAA).

(c) The Winding-up and Restructuring Act.

(d) The Canada Business Corporations Act (CBCA).

Question 1.3

Which of the following is **incorrect** with respect to proceedings under the CCAA:

(a) The CCAA is a debtor-in-possession restructuring statute.

(b) The CCAA is available to companies with debts of less than CAD 5 million.

(c) The CCAA is a federal statute.

(d) The CCAA sets out a relatively skeletal framework, and affords broad discretion to a judge as compared to a restructuring under the BIA.

Question 1.4

Select the **most correct** answer from the options below:

The purpose(s) and objective(s) of the BIA is / are to –

(a) provide for the financial rehabilitation of insolvent persons.

(b) allow for an investigation to be made into the affairs of a bankrupt.

(c) provide a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a *pari passu* basis.

(d) all of the above statements are correct.

Question 1.5

Which of the following is **not** included in the definition of an "insolvent person" under section 2 of the BIA:

(a) A person who is not bankrupt.

(b) A person who resides or carries on business or has property in Canada.

(c) A person whose liabilities to creditors provable as claims under the BIA amount to at least CAD 10,000.

(d) A person (i) who is unable to meet obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course of business as they generally become due, or (iii) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all his obligations due and accruing due.

Question 1.6

Indicate the **correct** answer:

Under Canadian law, when a company enters the "zone of insolvency", the directors of a company –

(a) continue to have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.
(b) no longer have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.

(c) cannot be held personally liable for any of the company's debts.

(d) cannot consider, under any circumstances, the interests of creditors, consumers, governments, employees, or any other stakeholder in discharging their duties.

Question 1.7

Indicate whether the statement below is **true or false**:

Insolvency proceedings in Canada are governed primarily by federal statutes.

(a) True.

(b) False.

Question 1.8

Indicate whether the statement below is **true or false**:

The CCAA is a debtor-in-possession restructuring statute designed for the reorganisation of insolvent companies with debts under CAD 5 million.

(a) True.

(b) False.

Question 1.9

Indicate whether the statement below is **true or false**:

In Canada, both natural persons and legal entities may be subject to bankruptcy proceedings under the BIA.

(a) True.

(b) False.

Question 1.10

Indicate whether the statement below is **true or false**:

Foreign creditors and Canadian creditors participate equally in a bankruptcy and no distinction is made between them.

(a) True.

(b) False.

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 3 marks]

Identify three of the recognised purposes of the BIA.

Answer:

The recognized purposes of the Bankruptcy and Insolvency Act (BIA) includes the following:

(a) providing for the financial rehabilitation of insolvent persons;
(b) providing a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a pari passu basis;
(c) allowing for an investigation to be made into the affairs of a bankrupt; and

(3)

(d) setting aside transfers under value, preferences, settlements and other fraudulent transactions so all creditors may share equally in the value of the bankrupt's assets[1].

In addition to this discussion paper on Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act[2] stated that the BIA provides a legislative framework to address both consumer and commercial insolvency situations. In bankruptcy, the Act provides for the liquidation of the bankrupt's assets by a trustee and the distribution of the proceeds in a fair and orderly way among the creditors. Alternatively, the Act provides a mechanism for insolvent consumers or commercial debtors to avoid bankruptcy by negotiating settlements with their creditors to reorganize the debtor's financial affairs.

Question 2.2 [maximum 2 marks]

Generally, in the context of an individual bankruptcy, what type of assets can a debtor keep in a bankruptcy?

Answer:

In the context of an individual bankruptcy, there are certain types of an assets that a debtor can retain depends upon the province or territory in which they live. However, types of assets can be kept in bankruptcy includes the following:

(a) personal items and clothing;
(b) household furniture, food and utensils in the debtor's permanent home;
(c) tools necessary to a debtor's work;
(d) a motor vehicle with a value up to a certain limit; and
(e) certain farm property.

(2)

In some provinces there is a limited homestead exemption. For instance, in Ontario, under the Execution Act[3] the principal residence of the debtor is exempt from forced seizure or sale if the value of the debtor's equity in the principal residence does not exceed the prescribed amount of CAD 10,000[4].

In addition to this certain Retirement Savings like Registered Retirement Savings Plans (RRSPs) and Registered Pension Plans (RPPs) are generally protected in bankruptcy, up to a certain limit. Under section 67 of the BIA, amounts held by individuals in RRSPs are exempt from seizure in bankruptcy, subject to a possible claw-back for contributions made in the 12 months preceding bankruptcy.

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[1] The Hon Mr Justice Lloyd Houlden, Mr Justice Geoffrey B Morawetz and Dr Jannis P Sarra, "The 2019 Annotated Bankruptcy and Insolvency Act" A§2.
[2] Government of Canada. Discussion paper on Statutory Review of the Bankruptcy and Insolvency Act and the Companies. This publication is available online at https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00021.html.
[3] Macdougall, *supra* note 54, p 438.
[4] Execution Act [1990], c E 24, s 2(2).

Question 2.3 [maximum 3 marks]

Name three types of court-officers that may be appointed in insolvency proceedings.

Answer:

The insolvency proceedings in Canada, is largely overseen by court appointed representatives/officers who administer the process. Here are three types of court officers commonly appointed in insolvency proceedings:

(i) Trustee: BIA liquidating bankruptcy proceedings are managed by a trustee. The trustee must seek court approval when taking certain steps, such as selling the debtor's property and finalizing its discharge. BIA proposal proceedings are debtor-in-possession, but a proposal trustee manages the process.

(ii) Monitor: In CCAA proceedings, a monitor is appointed by the court to oversee the process on its behalf and any plan of arrangement approved by the creditors of the debtor must also be approved by the court.

(iii) Receiver: A receiver is a court-appointed officer responsible for taking control of and managing the assets and affairs of an insolvent entity. For e.g. CBCA is managed by the corporation, but the court typically establishes the process for presenting the arrangement to the company's stakeholders and, once approved by the stakeholders, the arrangement must be approved by the court. In a court-ordered receivership the receiver obtains its powers from the appointing order and periodically reports to the court to seek approval of its activities, including the approval of sales processes, the acceptance of bids and approval of major asset sales, as well as distributions to creditors.

(3)

Question 2.4 [maximum 2 marks]

What is the definition of a "person" in section 2 of the BIA?

Answer:

Section 2 of the BIA defines person as under:

"person includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person"

(2)

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks]

Write an essay on the difference between a private receiver and a court-appointed receiver.

In your essay you should refer to at least the following: (i) how each type of receiver is appointed, (ii) the duties of each type of receiver, and (iii) the circumstances in which each type of receiver is generally used.

Answer:

A receiver is a third party (licensed professional) appointed by a court through a court order or by a secured creditor through a letter of appointment to:[5]

- take control of property and manage the business in place of the existing management.
- supervise liquidation proceedings.
- remit the proceeds according to priorities established by common or statutory law.

There are two types of receivers: (i) privately appointed receiver appointed by a secured creditor (ii) court-appointed receiver. This essay explores the key distinctions between these receivers, including their appointment process, duties, and typical usage.

(i) Appointment Process:

Private Receiver:
A private receiver is appointed by a secured creditor under the terms of a security agreement. This appointment is made by the creditor outside of court proceedings. The appointment of a private receiver is typically based on contractual rights established in the loan agreement, allowing the secured creditor to enforce its security interest. The private appointment became the most common form of receivership used by secured creditors. It was less expensive because it required less supervision by the court, and the obligations and duties of the privately appointed receiver were less onerous than those imposed on a court appointed receiver[6].

Court-Appointed Receiver:
Court Appointed Receivers however, are officers of the Court and act on behalf of all creditors. The powers and rights of Court Appointed Receivers are included in the Court order that appointed them[7]. Section 243 of the BIA authorizes a secured creditor to apply to the court for the appointment of a receiver with national authority to take control of the business when the debtor is unable to meet its obligations under the security agreement. The Courts of Justice Acts of the individual provinces also allow the court to appoint a receiver on application by any interested party (including shareholders or unsecured creditors) where it is "just and convenient" to do (called an "equitable receiver"). Court appointments usually occur in more complex cases, especially where there are competing claims between creditors or disputes between the creditor and the debtor, or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis.

(ii) Duties:

Private Receiver:
The duties of a private receiver are primarily focused on protecting the interests of the appointing secured creditor. Their responsibilities include taking control of and managing the

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[5] Government of Canada. (2023, June 3). Receivership. Retrieved from Canada Revenue Agency (CRA): https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/changes-your-business/receivership-bankruptcy/receivership.html

[6] Two notable exceptions are J. Ziegel, "The Privately Appointed Receiver and the Enforcement of Security Interests: Anomaly or Superior Solution?" in Current Developments in International and Comparative Corporate Insolvency Law, J. Ziegel ed. (Oxford, Clarendon, 1994) 450 and T. Buckwold, "The Treatment of Receivers in the Personal Property Security Acts: Conceptual and Practical Implications" (1997), 29 C.B.L.J. 277.

[7] PwC Canada. (2023, June 3). What is a Receivership? Retrieved from PwC Canada: https://www.pwc.com/ca/en/services/insolvency-assignments/what-is-receivership.html#:~:text=Privately%20Appointed%20Receivers%20will%20generally,on%20behalf%20of%20all%20creditors.

assets of the debtor to maximize recovery for the secured creditor. Private receivers have a fiduciary duty to act in the best interests of the secured creditor, ensuring that the creditor's rights and security are preserved.

Court-Appointed Receiver:

The duties imposed upon a court appointed receiver were more onerous than those imposed upon a privately appointed receiver at common law. A court appointed receiver was not subject to the control or direction of the secured creditor, but was under an obligation to consider the interests of all parties[8]. Court-appointed receivers must act in accordance with the court's directions and are accountable to the court for their actions.

Common duties: Further Federal and provincial legislation has imposed an obligation on a receiver to act in good faith and in a commercially reasonable manner[9].This obligation applies to both courts appointed and privately appointed receivers. Some commentators have argued that privately appointed receivers must now adhere to the more onerous obligations required of court appointed receivers[10]. However, Canadian courts have not extensively analysed the nature and extent of the duty to act in a commercially reasonable manner, and there remains considerable uncertainty as to whether it requires a privately appointed receiver to consider the interests of others in determining the timing of the sale.

(iii) Typical Usage:

Private Receiver:
Private receiverships are commonly used in situations where a secured creditor has a registered security interest over specific assets or property of the debtor. Private receiverships are often employed to realize on the security and recover the outstanding debt owed to the secured creditor. They are commonly utilized in cases of default on loans, mortgages, or other secured obligations.

Court-Appointed Receiver:
Court-appointed receiverships are generally utilized in more complex or contentious insolvency situations. They may be appointed in response to applications for relief, such as during bankruptcy proceedings or corporate restructurings. Court-appointed receiverships provide an independent oversight mechanism, ensuring that the rights and interests of all stakeholders are protected and that the insolvency process is conducted fairly and in accordance with applicable laws.

Conclusion:

In summary, the key differences between private receivers and court-appointed receivers in Canada are rooted in their appointment process, duties, and typical usage. Private receivers are appointed by secured creditors based on contractual rights and primarily serve the interests of the appointing creditor. In contrast, court-appointed receivers are appointed by the court and have a broader duty to act in the best interests of all stakeholders involved. Understanding these distinctions is essential for parties involved in insolvency proceedings to navigate the complexities and nuances of receiverships effectively.

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[8] Ostrander v. Niagara Helicopters Ltd. (1973), 19 C.B.R. (N.S.) 5 (Ont. H.C.J.)
[9] BIA, s.247; Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 99; Personal Property Security, Act, R.S.A. 2000, c. P-7, s.66(1).
[10] T. Buckwold, "The Treatment of Receivers in the Personal Property Security Acts: Conceptual and Practical Implications" (1997), 29 C.B.L.J. 277

Question 3.2 [maximum 7 marks]

Write a short essay that identifies the three methods for entering into bankruptcy. In your essay, explain the meaning of an "act of bankruptcy".

Answer:

In Canada, both natural persons and legal entities are subject to bankruptcy proceedings. The BIA contains a comprehensive code for the orderly liquidation of a bankrupt's estate and the distribution of the value of the assets in that estate to the bankrupt's creditors. There are three methods for entering into bankruptcy[11]:

(i) Involuntary;
(ii) Voluntary; and
(iii) On the failure of, or failure to perform the terms of, a BIA proposal.

(i) Involuntary bankruptcy:

A Involuntary bankruptcy, results when one or more creditors file with the court a petition which successfully alleges that:

(a) the debts owing to the petitioning creditor(s) is greater than or equal to $1,000; and
(b) the debtor has committed an act of bankruptcy within six months of the filing of the petition (s. 43).

Section 42 of the BIA defines "acts of bankruptcy" and includes:

good.

(a) an assignment of property to a Trustee for the benefit of creditors;
(b) a fraudulent gift, delivery or transfer of property;
(c) a conveyance or transfer of property (or creation of a charge) that is a fraudulent preference;
(d) the debtor, with the intent to defeat or delay his creditors, departs out of Canada or remains out of Canada or departs from his dwelling or otherwise absents himself;
(e) permitting, for certain periods of time, execution under which the debtor's property is taken;
(f) an admission of his inability to pay debts;
(g) assigns, removes, secretes or disposes of or attempts or is about to do same with his property with the intent to defraud, defeat or delay his creditors or any of them;
(h) giving notice to creditors that the debtor has suspended or is about to suspend payment of debts;
(i) defaulting on a proposal; and
(j) if the debtor ceases to meet liabilities generally as they become due.

The most commonly relied on act of bankruptcy is ceasing to meet liabilities generally as they become due. However, the creditors must point to a pattern of failing to meet liabilities, as opposed to a failure to pay one creditor. Special circumstances may, however, exist such that failure to pay one creditor is an act of bankruptcy, for example, if that creditor is owed a significant sum of money.

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[11] Government of Canada. (2023, June 4). Bankruptcy. Retrieved from Canada Revenue Agency (CRA): https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/changes-your-business/receivership-bankruptcy/bankruptcy.html

If a bankruptcy order is made, a Trustee must be appointed over the property of the bankrupt. (s. 43(9)). The Court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of a petition for a bankruptcy order but before the bankruptcy order is made, appoint a licensed trustee as interim receiver of the property of the debtor or any part thereof. The general idea of an interim receiver is to secure and protect property of a debtor, pending the hearing of the petition (s. 46).

(ii) Voluntary bankruptcy

Voluntary bankruptcy occurs when the debtor pursuant to section 49 of the BIA, may make an assignment of all of his property for the general benefit of his creditors. This is done by filing an assignment with the Official Receiver. The official receiver then appoints the Trustee. In a voluntary proceeding the debtor chooses the trustee, however this selection is subject to confirmation by unsecured creditors at the first meeting of creditors.

Voluntary Bankruptcy can be done for a number of reasons, including to stay legal actions by creditors, or, in the case of an individual, to obtain a fresh start once the proceedings have concluded. To be eligible to file a voluntary bankruptcy, the debtor must fall under the BIA definition of insolvent person.

↳ could we have explained this? ie. the requirements of s.2 of BIA?

(iii) Failure of BIA proposal

The BIA contains provisions for both corporate and consumer proposals that allow debtors to reach compromises with their creditors. Accordingly, the Proposals must be accepted by the requisite majorities of creditors and approved by the court. If a corporate proposal is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy. If the corporate proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy. If a debtor defaults under the terms of its proposal and such default is not waived by inspectors (creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. Thereafter a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically assigned into bankruptcy.

Accordingly, as explained above individuals and businesses have three primary methods for entering into bankruptcy.

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QUESTION 4 (fact-based application-type question) [15 marks]

You are a lawyer in Canada. You are consulted by counsel in a foreign jurisdiction who is representing an agent operating under the law of that foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. An online seller has a fulfilment office and warehouse in Canada. The foreign agent has taken control of the assets of an online seller of clothing with a head office that is registered in the foreign jurisdiction where senior management of the company have their offices. The business sells clothing around the world, including to customers in Canada. Due to currency exchange- and supply-related issues, the company has been unable to maintain liquidity and has defaulted on various loans to its foreign-based secured lenders who are owed in excess of CAD 200 million and, as a result, has stopped fulfilling orders in process, including to Canadian customers. As a result, a class action lawsuit has been filed by a Canadian law firm seeking damages on behalf of customers for monies paid in respect of unfulfilled orders in the amount of CAD 2 million. This lawsuit in Canada is still in the pleadings phase. It also appears that the Canadian resident in charge of the fulfilment office and warehouse in Canada may have been diverting funds improperly. The foreign agent wants to

further investigate. The foreign agent consults you about seeking recognition of the foreign proceeding in Canada in order to maximise recoveries and provide for an equitable distribution of value among all creditors.

Question 4.1 [maximum 5 marks]

The foreign agent wants to understand the process to commence a recognition application and obtain recognition of the foreign proceeding in Canada. What is your advice in this regard?

Answer:

As a lawyer in Canada, I can provide advice on the process to commence a recognition application and obtain recognition of the foreign proceeding in Canada. Here are the steps and considerations for the foreign agent:

(i) Sharing information about the adoption of UNCITRAL Model Law on Cross Border Insolvency by Canada:
Firstly, I will provide guidance to the foreign agent that through the 2009 amendments to the BIA and CCAA, Canada has adopted a modified version of the UNCITRAL Model Law in Part XIII of the BIA[12] and a new Part IV of the CCAA[13]. Accordingly, Foreign agent may file application for recognition of the foreign proceeding before the Canadian court.

(ii) Prepare and File a Recognition Application:
Second step is to provide guidance to the foreign agent to prepare and file application of recognition before the Canadian Court. It may be noted that a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he is a foreign representative.

(iii) Provide Supporting Documents:
The provisions of the BIA and CCAA on the recognition of foreign insolvency proceedings require Canadian courts to recognize foreign proceedings on formal proof of three main requirements:

(1) that the proceeding is a "foreign proceeding" in accordance with the statutory definition;
(2) that the applicant is a "foreign representative" in accordance with the statutory definition; and
(3) whether the "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" based on a centre of main interest (COMI) analysis.

Accordingly, the application must be accompanied by — good.

- a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
- a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

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[12] BIA, s 267-284.
[13] CCAA, s 44-65.

(iv) Attend Court Hearing:
After the application has been served, a court hearing will be scheduled to consider the application for recognition. Being a lawyer, I will represent the foreign agent at the hearing and present arguments supporting the recognition of the foreign proceeding in Canada.

(v) Obtain Recognition Order:
If the court is satisfied with the evidence and arguments presented, it may grant a recognition order. This order recognizes the foreign proceeding in Canada and allows the foreign agent to exercise its powers and authority in dealing with the assets of the insolvent company within the Canadian jurisdiction.

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(vi) Compliance with Canadian Laws:
Following the recognition order, the foreign agent must ensure compliance with Canadian laws and regulations while carrying out its duties and investigations. Being a lawyer i can assist in navigating the complexities of the Canadian legal system and provide guidance on the agent's rights and obligations.

Question 4.2 [maximum 5 marks]

The foreign agent wants to understand the factors considered by a court in determining whether a jurisdiction is a "centre of main interest" in respect of a foreign proceeding. What would you inform the foreign agent in this regard?

Answer:

As such there is no statutory definition of COMI in either the CCAA or the BIA, however each statute contains a rebuttable presumption. In the case of an individual, the COMI, in the absence of proof to the contrary, is the debtor's ordinary place of residence. However, in the case of a companies, the COMI, in absence of proof to the contrary, is the company's registered office. In addition to this, the Canadian courts may rebut this presumption and may consider the following factors[14] to determine the COMI[15]:

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- the location is readily ascertainable by creditors;
- the location is one in which the debtor's principal assets or operations are found; and
- the location is where the management of the debtor takes place.

It is important to note that the determination of COMI is a fact-specific inquiry, and all relevant circumstances must be considered. Canadian courts will examine the overall picture and weight the various factors to determine whether the foreign jurisdiction is the COMI for the purpose of recognizing the foreign proceeding in Canada

→ So what do you think the COMI is? missing your opinion and analysis on the complexities of this fact pattern...

Question 4.3 [maximum 5 marks]

The foreign agent wants to know whether the Canadian court is limited to Canadian entitlements and remedies in the relief that they can provide. Advise the foreign agent in this respect.

[14] Lightsquared LP (Re), 2012 ONSC 2994.
[15] Williams, L. M., Grossell, M., & Fesharaki, P. (2019). Cross-border insolvency in Canada.

Answer:

Canadian courts are not limited to providing only Canadian entitlements and remedies in a recognized foreign proceeding and has in fact ordered relief in foreign-main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings[16]. Both the BIA and the CCAA contain broadly worded, discretionary powers that provide where an order recognizing a foreign proceeding has been made, the court may, on application by the foreign representative, make "any order that it considers appropriate.[17]" Once a foreign proceeding is recognized in Canada, the court has the power to grant a range of relief, which may include the following:

Stay of Proceedings: If a foreign proceeding is recognized as the foreign main proceeding, an automatic stay of proceedings occurs in Canada[18]. If a foreign proceeding is recognized as a foreign non-main proceeding, a stay may still be obtained, but it must be requested and justified.

Obligation on Canadian officials to cooperate: The recognition imposes an obligation on Canadian officials to cooperate with the foreign representative and the foreign court.

Examination and Investigation: The court can authorize the foreign agent or its representatives to conduct examinations and investigations in Canada to gather evidence, including investigating allegations of improper fund diversion by the Canadian resident in charge of the fulfilment office and warehouse.

Coordination with Foreign Proceeding: The court can facilitate coordination and communication between the foreign agent and other stakeholders in the foreign proceeding, such as creditors, in order to achieve an equitable distribution of value among all creditors.

Asset Preservation: The court can issue orders to preserve and protect the assets of the insolvent company located in Canada. This may include restraining orders or freezing injunctions to prevent the dissipation of assets.

Relevant Case Study:

In *Re Hartford Computer Hardware Inc*,232 the Ontario Superior Court of Justice (Commercial List) granted a recognition order pursuant to the CCAA which, among other things, approved a "Final DIP Facility" containing a partial "roll up" provision whereby the prepetition lenders provided DIP financing that effectively paid off (or "rolled-up") the prepetition secured debt. This provision would likely be prohibited in a CCAA proceeding (as opposed to a foreign main proceeding) pursuant to section 11.2 of the CCAA, which provides that an interim financing charge in favour of a DIP lender may not secure an obligation that exists before the initial order is made. In granting this order, the court reviewed the public policy exception outlined in section 61(2) of the CCAA and determined that the exception ought to be interpreted in a restrictive manner, consistent with the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The court focused on the status of the proceeding as a foreign main proceeding, the fact the US court had granted the relief as necessary to the restructuring, and the lack of specific material prejudice or differentiation in the treatment of Canadian creditors.

*** End of Assessment ***

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[16] *Re Hartford Computer Hardware Inc*, 2012 ONSC 964.
[17] BIA, s 272 (1); CCAA, s 49(1).
[18] BIA, s 271 and CCAA, s 48.